Supreme Court, U.S.
FILED

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No. ——

In The
Supreme Court of the United States

KENT W. URBINE,
Petitioner,

vs.

PIEDMONT TRIAD AIRPORT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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January 25, 2002

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QUESTION PRESENTED

1. Whether a state, acting in combination with its political subdivisions (an airport authority, a county, and a city), may grant incentives in the form of discriminatory tax concessions and other benefits to a corporation engaged in interstate commerce in order to entice such corporation to establish a "hub" in the state for the interstate shipment of mail and freight to the detriment of the corporation's interstate competition and as a necessary component of the total scheme, condemn the property of a citizen, Petitioner herein, on which property the "hub" will be built?

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OPINIONS BELOW

The Opinion of the Supreme Court of North Carolina is reported at 354 N.C. 336, 554 S.E.2d 331 (2001). *See* Appendix A at 1a. The Order of the trial court is not reported and appears at Appendix B at 15a.

BASIS OF JURISDICTION

The Supreme Court of North Carolina rendered an opinion on November 9, 2001 holding that Respondent, acting in combination with local governments and the State of North Carolina, did not violate the Commerce Clause of the

United States (Article 1, Section 8, Clause 3) in condemning Petitioner's property as part of a package consisting of tax concessions and other benefits granted to Federal Express Corporation. This petition is therefore filed within the time allowed by law. Supreme Court Rule 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution provides, in relevant part:

> The Congress shall have power . . . to regulate Commerce . . . among the several states . . .

STATEMENT OF THE CASE

FACTS

This case raises the issue of whether a state, acting in combination with its political subdivisions, may, in derogation of the Commerce Clause of the United States Constitution (Article 1, Section 8, Clause 3) grant discriminatory tax concessions and other benefits as incentives to cause an interstate business to establish a business in the state and to therefore provide that business with a state sponsored competitive advantage over its business rivals, exemplary of what

is today sometimes referred to "the war between the states."

In 1998, Federal Express Corporation ("FedEx"), a world-wide shipper of mail and freight, requested airports in six states (App. H) to submit proposals setting out economic incentives the applicable governments would provide FedEx if it located a new distribution center (a "hub") at a specified airport in the several states. This competition progressively narrowed down to two states, including North Carolina. The proposal of the Respondent herein, Piedmont Triad Airport Authority ("PTAA"), included discriminatory tax concessions and tax exemptions by the State of North Carolina and area local governments, and other benefits to be extended by PTAA to FedEx. The incentives were valued at more than $156,000,000. App. C at 28a-30a.

In its proposal, PTAA agreed for itself, the City of Greensboro, Guilford County and the State of North Carolina:

> 1. To rent the necessary land, including Petitioner's land, to FedEx at one-half the rate at which it was renting similar land to an interstate competitor of FedEx. App. D at 31a-32a.
>
> 2. To maintain ownership in the name of PTAA of equipment used by FedEx, thus exempting FedEx from sales taxes on the

purchase thereof, and all subsequent ad valorem taxes. App. E at 34a, 35a, 37a; App. F at 38a-39a.

3. To refund sales and use taxes incurred for the purchase of certain equipment, including construction materials, sorting equipment, furniture and computer equipment and ground support equipment. App. E at 34a, 37a; App. F at 38a-39a.

4. To exempt (or arbitrarily apportion) FedEx from sales taxes on aircraft parts, lubricants and accessories. App. E at 34a, 36a, 37a; App. F at 38a-39a.

5. To arbitrarily apportion up to 90% of FedEx purchases of jet fuel to North Carolina. App. E at 36a; App. F at 38a-39a; and App. I at 44a-45a.

6. To purchase, or if necessary, condemn all the land needed by FedEx, including the property of the Petitioner on whose homesite the FedEx building will be built. App. G at 40a-42a.

FedEx accepted the North Carolina proposal, PTAA proceeded to condemn Petitioner's home, and this litigation resulted.

The North Carolina legislature proceeded to make good on its end of the bargain by:

1. Amending North Carolina General Statute § 105-164.13 to grant sales tax exemptions to FedEx, such that the statute now reads:

"The sale at retail, the use, storage or consumption in this State of the following tangible personal property is specifically exempted from the tax imposed by this Article: . . . . Sales of the following items to an interstate passenger air carrier (or an interstate air courier) for use at its hub: aircraft lubricants, aircraft repair parts, and aircraft accessories."

See N.C. Gen. Stat. § 105-164.13(45) (Effective January 1, 2001).

2. Amending North Carolina General Statute § 105-164.4 to place a sales tax cap of 1% on equipment purchased by FedEx, including:

"Sales of the following items to an interstate air courier for use at its hub: materials handling equipment, racking systems, and related parts and accessories, for the storage or handling and movement of tangible personal property at an airport or in a warehouse or distribution facility."

See N.C. Gen. Stat. § 164.4A(11) (Effective January 1, 2001).

3. Amending North Carolina General Statute §105-275 to exempt FedEx aircraft from ad valorem taxes, such that the statute now reads:

"The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:

* * *

Aircraft that is owned or leased by an interstate air courier is apportioned under G.S. 105-337 to the air courier's hub in this State, and is used in the air courier's operations in this State."

See N.C. Gen. Stat. §105-275 (24) (Effective for taxes imposed for taxable years beginning on or after July 1, 2001).[1]

Hence, interstate competitors of FedEx doing business at the airport will pay the full market rate for land rental while FedEx pays half or less of such rate, will pay the full rate in ad valorem taxes on valuable

---

1 *See also* N.C. Gen. Stat. § 105-164 defining an interstate air courier as "A person engaged in the air courier services business . . . in interstate commerce."

aircraft and other equipment while FedEx pays nothing, and will pay the full 6 1/2% sales tax to the state and local governments while such taxes to FedEx are either nonexistent or very limited with a cap of 1%. The condemnation of Petitioner's home is the central and essential cog to the total scheme. The FedEx building, for the exclusive use of FedEx, will be built on Petitioner's homesite. App. G at 40a-41a.

Petitioner moved for injunctive relief in the trial court below. Both the trial court and the Supreme Court of North Carolina denied relief.

FEDERAL QUESTIONS DULY RAISED

The "negative" or "dormant" Commerce Clause of the United States Constitution was raised by Petitioner in the trial court, at paragraph 9 of the counter-claim section of his Amended Answer. App. J at 51a. The trial court concluded in its Order denying relief that the condemnation of Petitioner's property did not violate the Commerce Clause. App. B at 25a. Petitioner appealed from that ruling to the North Carolina Supreme Court which, in turn, affirmed the conclusion of the trial court. App. A at 13a-14a. Specifically, the North Carolina Supreme Court stated in its opinion of this case that:

> The dormant, or negative Commerce Clause is awakened only when Congress has not acted "to regulate commerce... among the several states." U.S. Const. Art. I, § 8, Cl. 3. *We find no case law that*

> *supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property.* This assignment of error is overruled.
>
> *Urbine,* App. A at 13a (emphasis added).

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

The decision of the Supreme Court of North Carolina in *Urbine* conflicts directly with the relevant decisions of this Court. The case has nationwide importance because the facts here are representative of a current internecine war between the states to attract industry, with the states involved usually pleading that they have no choice but to participate because other states do it. Obviously, the net result as between the states of any resulting economic benefit is zero. We respectfully submit that in the absence of a decision of this Court, there can be no solution to such wasteful and discriminatory practices which impact entirely on interstate commerce.

This Court has held on repeated occasions that a state or local government cannot use the power of taxation to discriminate against participants in interstate commerce – on either end of the equation. Illustrative is *Boston Stock Exchange* v. *New York State Tax Commission,* 429 U.S. 318 (1977). There the New York Stock Exchange threatened to leave the state, *id.* at 323-24, because New York had imposed a stock transfer tax if any part of a stock sale transaction

occurred in New York. *Id.* at 322. The New York legislature then enacted legislation which gave out-of-state buyers a 50 percent reduction in the tax if they did business with a New York stock exchange. *Id.* at 324. The NYSE decided not to move. *Id.* Exchanges in other states brought suit.

This Court held in *Boston Stock Exchange* that the tax reduction at issue burdened interstate commerce because it diverted business from other states to New York. The Court explained that the tax meant that business was:

> diverted from the most economically efficient channels and directed to New York. This diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free trade purpose of the Commerce Clause.

Boston Stock Exchange at 336. Going further, the Court pointed out that it made no difference which end of the equation was being considered, whether that of an in-state or out-of-state competitor:

> The fact that this discrimination is in favor of nonresident, in-state sales which may also be considered as interstate commerce does not save [the transfer tax] from the restrictions of the Commerce Clause. A State may no more use discriminatory taxes to assure that

> nonresidents direct their commerce to businesses within the State than to assure that residents trade only in intrastate commerce. As we stated at the outset, the fundamental purpose of the Clause is to assure that there be free trade among the several States. This free trade purpose is not confined to the freedom to trade with only one State; it is a freedom to trade with any State, to engage in commerce across all state boundaries.

Id. at 334-35 (internal citations omitted).

Similar discriminatory incentive-schemes have likewise failed the test of the Commerce Clause. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 520 U.S. 564 (1997) (Maine property tax exemption violates the Commerce Clause if the non-profit entity provides services principally for non-residents); *Armco Inc. v. Hardesty,* 467 U.S. 638 (1984) (West Virginia sales tax imposed only on goods manufactured out of state rejected even though state imposed separate tax on in-state manufacturers); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (North Carolina law prohibiting sellers of apples grown in the state of Washington from using packages showing Washington's apple grading system ruled violative of the clause); *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970) (Arizona statute rejected providing that cantaloupes grown in the state must be packed before shipping, barring growers to dealing with out-of-state packers).

Here, the North Carolina incentives, the foremost of which is the condemnation of Petitioner's property for the benefit of FedEx, is likewise an attempt to divert economic activity from other states to North Carolina, making this tax scheme just as unconstitutional as the others cited above. The North Carolina incentives at issue are functionally identical to those previously disapproved by this Court. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Similarly, this Court has repeatedly held that a subsidy, by a tax concession or otherwise, is constitutionally a tariff. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994), the state government collected a tax on milk sold in Massachusetts by all dealers, both in-state and out-of-state, and distributed the proceeds only to the in-state dairy farmers. *Id.* at 186. In assessing and rejecting the subsidy at issue in *West Lynn Creamery*, this Court held that Massachusetts had provided an advantage to in-state producers that was unconstitutional:

> The Massachusetts pricing order thus will almost certainly cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market. In fact, this effect was the motive behind the promulgation of the pricing order. This effect renders the program unconstitutional, because it, like a tariff,

> neutraliz[es] advantages belonging to the place of origin.

Id. at 196 (internal quotation marks and citations omitted).

Similarly, in this case, FedEx will be given a $156,000,000 competitive advantage over other interstate shippers of mail and freight. This is a competitive advantage which conflicts with the negative commerce clause. The blatant manipulation of interstate commerce by the State of North Carolina cannot, we respectively submit, be tolerated under our Constitution.

Further, it is fundamental that taxes among our citizens must be fairly apportioned, meaning that each state may only tax that portion of income "that is attributable to activity within its borders." *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 188 (1989). In this case, there is apportionment without a pretense of fair apportionment. Respondent, for itself and the state of North Carolina, promised to arbitrarily apportion 20% of the sale of aircraft parts and 90% of other purchases to North Carolina. There was no formula whatsoever - simply arbitrary numbers to make North Carolina attractive. Even the Executive Director of the PTAA testified that he knew of no basis for the amount of the apportionment. App. I. at 44a-45a.

Westinghouse Electric Corporation v. Tully, 466 U.S. 388 (1984), is also enlightening. There, the Court held:

> No state, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business."

Id. at 403 (quoting *Boston Stock Exchange*, 429 U.S. 319 at 329. Similarly instructive is *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988). In that case, Ohio granted a sales tax credit for ethanol produced in Ohio or in a state with the same kind of tax credit. *Id.* at 272 (internal citations omitted). Ohio claimed that the credit would promote interstate commerce by encouraging other states to enact similar tax schemes. *Id.* at 274. However, the Court ruled that such a burden on interstate commerce could not be justified:

> [S]tate statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.

Id. at 274. Economic protectionism by a state -- as is the case here -- is prohibited by the negative Commerce Clause.

CONCLUSION

The integral package which the local governments and the state of North Carolina have offered, and which FedEx has accepted, flagrantly violates the negative Commerce Clause and deprives

Petitioner of his home. We respectfully submit that this Court accept certiorari to the end that appropriate relief may be granted.

Respectfully submitted, this the 25th day of January, 2002.

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January 25, 2002

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

NO. 367PA00

FILED: 9 NOVEMBER 2001

PIEDMONT TRIAD AIRPORT AUTHORITY
v.
KENT W. URBINE, et al.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order entered on 20 April 2000 by DeRamus, J., in Superior Court, Guilford County. Heard in the Supreme Court 14 March 2001.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr., Bruce P. Ashley, and Michael C. Mascia; and Cooke & Cooke, L.L.P., by William O. Cooke, Jr., Greensboro, for plaintiff-appellee.

Law Offices of William F. Maready, by William F. Maready and Celie B. Richardson, Winston-Salem, for defendant-appellant Kent Urbine.

Office of the City Attorney, Rebecca K. Cheney, Assistant City Attorney, on behalf of City of Charlotte; and Moore & Van Allen, PLLC, by James M. Tatum, and James W. Dymond, Durham, on behalf of Raleigh-Durham Airport Authority, amici curiae.

BUTTERFIELD, Justice.

The Piedmont Triad Airport Authority (PTAA), located in Guilford County, instituted a condemnation action on 14 December 1998 to acquire 2.326 acres of land owned in fee simple by Kent W. Urbine, subject to liens held by the other named defendants. In his answer to PTAA's complaint, defendant challenged PTAA's assertion that the condemnation is for a public purpose. On appeal, defendant specifically alleges that his property is being condemned for the exclusive use of Federal Express Corporation (Federal Express), a current tenant of PTAA.

Pursuant to N.C.G.S. § 40A-47, a hearing was held at the 20 March 2000 Civil Session of Superior Court, Guilford County, to determine issues other than compensation. On 20 April 2000, the trial court entered an order in which it ruled that plaintiff had the authority to condemn the property, ruled that the taking was for a public purpose and use, determined all issues other than that of just compensation in favor of plaintiff, vested plaintiff with fee simple title to the property, granted plaintiff the right to immediate possession of the property, and dismissed defendant Urbine's counterclaim with prejudice. On 20 December 2000, this Court granted defendant-appellant Kent Urbine's petition for discretionary review prior to a determination by the Court of Appeals.

Defendant presents three questions for this Court's consideration: first, whether the trial court committed reversible error in ruling that the condemnation of defendant's property was for a public purpose and, thus, not violative of Article V, Section

(1) of the Constitution of North Carolina; second, whether the trial court committed reversible error in ruling that the economic incentives proposed to Federal Express were immaterial to this action and provided no defense to the condemnation; and third, whether the trial court committed reversible error in ruling that the condemnation was authorized by PTAA's charter.

Defendant focuses his first arguments upon the public purpose clause of Article V, Section 2(1) of the Constitution of North Carolina, which provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." N.C. Const. art. V, §2(1). Defendant argues that PTAA's exercise of eminent domain here is not for a public purpose and is, therefore, unconstitutional.

In the recent condemnation case of *Piedmont Triad Reg'l Water Auth. V. Sumner Hills Inc.*, 353 N.C. 343, 543 S.E.2d 844 (2001), we established that *de novo* review is the appropriate standard of review for a hearing pursuant to N.C.G.S. § 40A-7(a). In that case, we stated the following:

> It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated. *See, e.g., State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 6571, 674-75 (2000) (whether to grant a motion to continue is in the trial court's discretion; however, when a constitutional question is implicated, de

novo review is appropriate); *see also Ornelas v. United States*, 517 U.S. 690, 696-97, 134 L.Ed.2d 911, 918-19 (1996) (in reviewing constitutional standards that are not "finely-tuned," de novo review is necessary for appellate courts to maintain control of and clarify the legal principles, to "unify precedent," and to provide a defined set of rules).

Piedmont Triad Reg'l Water Auth., 353 N.C. at 348, 543 S.E.2d at 848. In *Piedmont Triad Reg'l Water Auth.*, this Court examined a taking under N.C.G.S. § 40A-7(a) where the condemnor sought to condemn an entire tract of land that included a 97-acre portion acquired in excess of the public use. In the instant case, we are examining similar constitutional questions and pertinent statutes that call upon us to be "mindful of our duty to construe the statute[s], if possible, in a constitutional fashion." *Id.* Therefore, we hold that *de novo* review is the appropriate standard of review applicable to the case *sub judice*.

We must clarify two terms that have recently been treated almost synonymously. There remains a distinction between the terms "public purpose" and "public use." Although the analysis in determining both is often similar, the term "public purpose" pertains to governmental expenditures of tax monies, while the term "public use" pertains to the exercise of eminent domain. This Court noted the distinction in *City of Charlotte v. Heath*, 226 N.C. 750, 40 S.E.2d 600 (1946), by stating, "[I]n any proceeding for condemnation under the power of eminent domain, what is a public purpose, or, more properly speaking, a public use, is one for the

Court." *Id.* At 754, 40 S.E. 2d at 604. Here, we will apply the term "public use" in its relation to the exercise of eminent domain. However, we cannot escape some mentioning of the related term "public purpose" as we refer to prior holdings. These holdings remain pertinent in the application of the public purpose clause of Article V, Section 2(1).

Defendant correctly notes that the power of eminent domain can be used to condemn private property only if it is for a public use. *Piedmont Triad Reg'l Water Auth.*, 353 N.C. at 346, 543 S.E.2d at 847. As we stated in *Maready v. City of Winston-Salem*, 342 N.C. 708, 720, 467 S.E. 2d 615, 623 (1996), '[t]his Court is no stranger to the question of what activities are and are not a public purpose." Nonetheless, as Justice (later Chief Justice) Sharpe wrote in *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968), "[a] slide-rule definition to determine public purpose for all time cannot be formulated." Our recent holdings in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989), and *Maready* have employed a two-prong analysis to aid the determination of public purpose in each case before us. Relying on *Madison Cablevision*, this Court in *Maready* stated, "'[t]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons.'" *Maready*, 342 N.C. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision*, 325 N.C.

at 646, 386 S.E.2d at 207 (citations omitted)). This analysis is equally applicable in determining what is and what is not a public use. We will apply the same two-prong analysis to the instant case.

Under the first prong of the analysis, the taking must have "'a reasonable connection with the convenience and necessity of the particular municipality'" - here, an airport authority. *Id.* (quoting *Madison Cablevision*, 325 N.C. at 646, 386 S.E.2d at 207). PTAA's master plan has called for the acquisition of defendant's property from as early as 1990. A revised master plan in 1994 also called for the property's acquisition. The purpose, under the 1994 master plan, of acquiring defendant's property was the future expansion and development of cargo facilities. The convenience and necessity of having an air-cargo facility adjacent to existing airport runways and facilities is undisputed. The obvious nature of PTAA's designs for expansion and improvement of the airport satisfies the first prong of our analysis.

The second prong of our analysis requires us to determine whether "'the activity benefits the public generally, as opposed to special interests of persons.'" *Id.* (quoting *Madison Cablevision*, 325 N.C. at 464, 386 S.E.2d at 207). PTAA was created under N.C.G.S. § 63-4, which allows municipalities to join together in establishing airports. N.C.G.S. § 63-4 (1999) (this statute was enacted in 1929 and has not been amended since its enactment). PTAA's supplementary enabling legislation, or charter, provides that "[a]ny lands acquired, owned, controlled or occupied by the said

Airport Authority shall, and are hereby declared to be acquired, owned, controlled and occupied for a public purpose" and expressly authorizes the use of eminent domain. Act of June 6, 1980, ch. 1078, sec. 3 (g) - (h), 1979 N.C. Sess. Laws (2d Sess. 1980) 1, 4. In a case dealing with the same airport authority at issue here, although then named differently, we stated the following:

> The public statute, G.S. [ ] 63-4, permitting the three municipalities concerned to act jointly is not repealed or modified, or its authority in any way affected by the supplementary acts under which the purpose and policy of the public statute are carried out in the creation of a single Airport Authority to serve all three municipalities – obviously the only way in which it could be done.

Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 10 36 S.E.2d 803, 810 (1946). The *Greensboro-High Point* holding that N.C.G.S. § 63-4 and the airport authority's charter operate in tandem is significant for the purposes of N.C.G.S. § 63-5, which provides as follows:

> Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in G.S. 63-2, 63-3 and 63-4 [permitting municipalities to join together in establishing airports], shall and are hereby declared to be acquired, owned,

> controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose.

N.C.G.S. § 63-5 (1999).

Any determination of what is a public use must rest upon the notions of the types of activities in which governmental bodies are to be engaged. Significantly, we must take notice of declarations expressed by the people of this state when they amend their constitution. We note that a recent amendment bears directly on the issues raised in the present action. The ratified amendment to Article V of the Constitution of North Carolina reads, in pertinent part:

> **Sec. 13. Seaport and airport facilities.**
> (1) Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to grant to the State, counties, municipalities, and other State and local governmental entities all powers useful in connection with the development of new and existing seaports and airports, and to authorize such public bodies:
>
> > (a) to acquire, construct, own, own jointly with public and private parties, lease as lessee,

> mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interest therein[.]

N.C. Const. art. V, § 13(1) (a). This provision of the Constitution of North Carolina expresses the clear public sentiment that the governmental entities named within Article V, Section 13 (1) should be engaged in developing and improving airports. However, we believe that not all actions purporting to be taken under the provision would necessarily be for a public purpose or for a public use.

Article V, Section 13(1) starts by stating, "Notwithstanding any other provision of this Constitution." *Id.* We read this language to supersede any other provision of the Constitution that may be in conflict with the provisions of Article V, Section 13 (1) (a). We must, therefore, determine whether Article V, Section 2 (1) is in conflict with Article V, Section 13 (1) (a). We do not believe that it is.

Article V, Section 2 (1) does not conflict with Article V, Section 13 (1) (a) in such a manner that the airport and seaport facilities provision cannot be implemented as envisioned by the people of this state. In *Lacy v. Fidelity Bank of Durham* 183 N.C. 373, 111 S.E. 612 (1922), this Court stated that "a constitution shall be construed on broad and liberal lines [ ] and so as to give effect to the intention of the people who have adopted it" and that a constitution "should be considered as a whole and construed to allow significance to each and

every part of it, if this can be done by any fair and reasonable intendment." *Id.* at 380, 111 S.E. 615. The public purpose clause of Article V, Section 2 (1) acts in concert with Article V, Section 13 (1) (a). All endeavors pursuant to Article V, Section 13 (1) (a) can be fully realized insofar as they are for a public purpose or a public use. Article V, Section 2 (1) does not act as a prohibition against developing and improving airports and seaports under Article V, Section 13 (1) (a). Rather, Article V, Section 2 (1) acts as a qualifier upon such undertakings.

Reading the Constitution of North Carolina as a whole and giving significance to each part, we believe that the people did not intend to abrogate the public purpose doctrine upon the adoption of Article V, Section 13. Article V, Section 2 (1) and Article V, Section 13 operate concurrently. To hold otherwise would create a *per se* presumption of public purpose and public use under Article V, Section 13 for any and all undertakings. This would be inconsistent with this Court's holdings that public purpose and public use cases are to be decided on a case-by-case basis. *See, e.g. Maready,* 342 N.C. at 716, 467 S.E.2d 615.

The significance of Article V, Section 13 under the second prong of our analysis is the clear desire of the people for governmental involvement in the development and improvement of airports and seaports. While the legislative declarations of public purpose and the people's desire under Article V, Section 13 influence our determination, we must still examine the particular use for defendant's property.

We are aware that the timing of the events surrounding this condemnation proceeding point to an inference that the property is being acquired to prepare for the accommodation of an expanded Federal Express facility. Our review of the facts leads us to the conclusion, consistent with that of the trial court, that the condemnation proceeding arises from PTAA's long-range plan to develop air-cargo facilities as called for in the master plan. While the overtures from Federal Express may have hastened the timing of this development, they are not the genesis of PTAA's actions.

Defendant contends that the property subject to the taking will be for the exclusive use and benefit of Federal Express, thereby making PTAA's actions a condemnation for a private rather than public use. The record reveals that Federal Express, which currently rents space at the airport, will pay for the cost of the facility's construction and will then pay rent to PTAA while a tenant. This is not an uncommon arrangement for PTAA and its tenants. Federal Express will not become the owner of defendant's property. If the facility is built, Federal Express will continue to be a tenant of PTAA, except that Federal Express will be in a larger facility that it will help construct. We believe that the concepts of improvement and development envision the physical expansion of such facilities. This is consistent with the public desire under Article V, Section 13, to improve existing airports. The arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, the greater benefits flow to the

people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that both prongs of our analysis are satisfied.

Defendant also alleges that the taking violates the Fifth Amendment to the United States Constitution but makes no argument further on this point. Therefore, we deem this contention to be abandoned. N.C.R. App. P. 28 (b) (5).

For the reasons above, we believe that PTAA's condemnation of defendant's property pursuant to PTAA's master plan is for a public use and does not violate Article V, Section 2(1) of the Constitution of North Carolina. Therefore, we hold that the trial court did not err in its ruling that the taking was for a public use and was not violative of Article V, Section 2 (1), and we overrule this assignment of error.

Defendant next challenges this condemnation proceeding by alleging that PTAA offered Federal Express numerous unconstitutional incentives to build its air cargo hub at the airport. Defendant classifies the condemnation as one of the incentives. Specifically,

defendant contends that the proposed incentives violate Article I, Section 8, Clause 3[1] (the Commerce Clause) of the United States Constitution; the Fourteenth Amendment to the United States Constitution; and Article V, Section 2(1) of the Constitution of North Carolina. Defendant cites no authority in support of his Article V, Section 2(1) or Fourteenth Amendment arguments. Therefore, we deem them to be abandoned. N.C.R. App. P. 28(b)(5).

The only portion of this issue properly before this Court is the condemnation of defendant's property. Defendant's challenge to the "package" of economic incentives, apart from the use of eminent domain, pertains to offers by entities not parties to this action and is outside the scope of our review. Thus, the only remaining question presented in this issue is whether the Commerce Clause is a sustainable defense to the condemnation proceeding. The dormant, or negative, Commerce Clause is awakened only when Congress has not acted "to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. We find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property. This assignment of error is overruled.

---

1 In his brief, defendant referred to Article I, Section 8, Clause 2 but quoted the language of Clause 3. It is clear from the context, however, that defendant meant to refer to Clause 3.

Lastly, defendant maintains that PTAA's charter does not authorize PTAA's condemnation of defendant's property and subsequent development and leasing of the property. For the reasons previously stated elsewhere in this opinion, we find this assignment of error without merit.

Accordingly, we affirm the order of the trial court.

AFFIRMED.

APPENDIX B

IN THE GENERAL COURT OF JUSTICE
OF NORTH CAROLINA

SUPERIOR COURT DIVISION
GUILFORD COUNTY
Case No. 98 CvS 11586

PIEDMONT TRIAD AIRPORT AUTHORITY,

Plaintiff

v.

KENT W. URBINE, et al.

Defendants.

ORDER

THIS CAUSE coming on to be heard and being heard before the undersigned Judge during the 20 March 2000 civil session of Guilford County Superior Court upon plaintiff Piedmont Triad Airport Authority's N.C.G.S. §40A-47 Motion to Determine Issues Other Than The Issue of Compensation; and the Court having considered the pleadings, the affidavits and other evidence presented with regard to the

motion, other matters in the record, and the arguments of counsel, now makes the following:

FINDINGS OF FACT

1. This is an action brought by plaintiff Piedmont Triad Airport Authority ("the Airport Authority") to acquire by condemnation fee simple title to and the right to possession of the real property described in Paragraph VII of the Complaint, as amended.

2. The Airport Authority is a body politic and corporate created and existing pursuant to the provisions of Chapter 98 of the Public Local Laws of North Carolina, Session 1941 and amendments thereto, and pursuant to Chapter 1078 of the 1979 Session Laws of North Carolina (2d Session 1980) and amendments thereto.

3. The Airport Authority does not have the power to tax and receives no financial support from the municipalities it serves. The Airport Authority depends upon its own revenues, including rentals from tenants and landing fees, to finance its operations and service its debt.

4. The Airport Authority owns and operates the Piedmont Triad International Airport ("the Airport"). The Airport is located in Guilford County, in the vicinity of the intersection of Highway 421 and

Regional Road North. The Airport Authority's activities with respect to the development of the Airport have included the acquisition of land surrounding the Airport, the construction and maintenance of improvements at the Airport, and the preparation of grant requests to the Federal Aviation Administration for airport improvement projects.

5. The Airport Authority owns over 3,000 acres upon which the Airport is located. The Airport Authority owns all of the real property and buildings at the Airport. Attached to the 22 February 2000 Affidavit of Edward A. Johnson as Exhibit A is a map showing in yellow the real property currently owned by or under contract to the Airport Authority.

6. The Airport Authority routinely leases real property and buildings at the Airport to tenants. The Airport Authority also regularly enters into rental agreements with tenants pursuant to which tenants construct facilities on Airport property. The Airport Authority becomes the owner of these facilities, while having them built and paid for by tenants.

7. The property at issue in this condemnation is located on Old Oak Ridge Road. The portion of this property not in the right-of-way of Old Oak Ridge Road is made up of 2.326 acres, and is one of only two parcels on Old Oak Ridge Road between Inman Road and Bryan Boulevard not currently owned by or under contract to the Airport Authority. The property at issue in this condemnation action is shown in red on Exhibit

A to the 22 February 2000 Affidavit of Edward A. Johnson.

8. The portion of the property at issue not in the right-of-way of Old Oak Ridge Road is designated as Lot 2 on the Plat for Kent Urbine which is recorded in Plat Book 112, Page 107, in the Office of the Guilford County Register of Deeds. As of 14 December 1998, the fee simple title to the property at issue was held by defendant Kent W. Urbine. This fee simple title was on said date held subject to the liens and encumbrances set forth in Paragraph XII of the Complaint, as amended.

9. The Exhibit Map designated as Exhibit B to the Complaint accurately depicts the boundaries of the 2.326 acre tract and the pond that is located thereon, as well as the easements on the property at issue that appear on the recorded plat.

10. On 25 August 1998, the Board of Directors of the Airport Authority adopted a resolution authorizing the condemnation of the property at issue by the Airport Authority. A copy of this resolution is attached to the 22 February 2000 Affidavit of Edward A. Johnson as Exhibit D.

11. The resolution states in part:

> RESOLVED, That in order to have available property for the expansion and enlargement of the facilities of the Piedmont Triad International Airport,

including but not limited to, the cargo storage and handling facilities, and to permit better utilization of its existing properties for aviation purposes, the Piedmont Triad Airport Authority does hereby find and determine that it is necessary for the Authority to acquire a fee simple title to the 2.326 acre tract of land owned by Kent W. Urbine, and upon which BellSouth Corporation has an easement, located at 6025 Ridge Road (State Road No. 2137) in Friendship Township, Guilford County, N.C. adjoining the lands of the Piedmont Triad Airport Authority and Richard N. Michaud, Jr., the same being shown on Exhibit A attached hereto.

RESOLVED FURTHER, That the Piedmont Triad Airport Authority does hereby find and determine that the acquisition of said 2.326 acre tract shall be for the public purpose of properly maintaining, improving, operating, and developing the airport facilities of the Piedmont Triad International Airport and that the acquisition of said tract of land is a matter of public necessity to enable the Authority to carry out public purposes for which it is created, organized and existing.

12. In response to defendant Kent W. Urbine's claim raised during the litigation that he owns a fee interest in the right-of-way of Old Oak Ridge Road in front of the 2.326 acre tract referred to above, the Airport Authority on 16 November 1999 adopted a supplemental resolution clarifying its intent to condemn all of Mr. Urbine's interest in the property at issue, including any interest that Mr. Urbine claims to have in the right-of-way of Old Oak Ridge Road. A copy of this supplemental resolution is attached to the 22 February 2000 Affidavit of Edward A. Johnson as Exhibit E.

13. On 15 December 1999, the Airport Authority filed an Amendment to the Complaint and recorded an Amended Memorandum of Action adding to the property description in this action an additional tract within the right-of-way of Old Oak Ridge Road in front of the 2.326 acre tract described in the original Complaint.

14. The Exhibit Map designated as Exhibit B-1 to the Complaint, as amended, accurately depicts the boundaries of this additional tract of approximately 21, 355 square feet within the right-of-way of Old Oak Ridge Road lying immediately in front of the 2.326 acre tract.

15. Periodically, the Airport Authority prepares an Airport Master Plan. The purpose of the Airport Master Plan is to forecast the needs of the Airport and to recommend a plan for development to

meet these needs. Acquisition of the real property at issue and of other property in the surrounding area has been part of the Airport Authority's Master Plan for the Airport since at least 1990.

16. The 1994 Master Plan Update for the Airport, as approved by the Federal Aviation Administration, delineates an area in the northwest quadrant of the Airport between the existing cargo facilities and Bryan Boulevard as a future air cargo area. This area, which includes the property at issue, was designated for acquisition by the Airport Authority for cargo development because of its proximity to the Airport's existing cargo facilities and the Airport's Terminal Building, because of its location on the same side of the existing Runway 5/23 as the Terminal Building, and because of its location between existing Runway 5/23 and the planned runway to be constructed parallel to Runway 5/23.

17. Between the time of the adoption of the 1994 Master Plan Update and late 1997, the Airport Authority took steps to implement the 1994 Master Plan Update, including steps to expand the Airport's air cargo facilities in the vicinity of the property at issue in accordance with the 1994 Master Plan Update. These steps included the acquisition of various parcels in the area of the property at issue, as well as the grading of a 34 acre site in the vicinity of the proposed cargo area.

18. In late 1997, Federal Express Corporation ("Federal Express"), a common carrier and a long-time tenant at the Airport, expressed interest in the future air cargo location designated in the 1994 Master Plan Update as a site for its Mid-Atlantic Hub, a large cargo sorting hub. In response to a request from Federal Express, the Airport Authority submitted a proposal in early 1998 relating to Federal Express' potential occupancy as a tenant of the general area of the future air cargo location shown in the 1994 Master Plan Update. This proposal is similar to other agreements entered into by the Airport Authority with tenants proposing to construct major improvements at the Airport. In April 1998, Federal Express announced its intention to locate its proposed Mid-Atlantic Hub facility at the Airport. As of the date of this Order, no lease agreement has been entered into between Federal Express and the Airport Authority, nor has any binding agreement been entered into by the parties for Federal Express to construct its Mid-Atlantic Hub at the Airport.

19. If the Airport Authority enters into a lease with Federal Express, the Airport Authority currently anticipates that the facility which Federal Express plans to construct and the area to be leased by Federal Express would occupy the property at issue and surrounding properties already owned by the Airport Authority. The facility planned by Federal Express will be owned by the Airport Authority, but will be

constructed by Federal Express and will be paid for by Federal Express.

20. Whether or not Federal Express ultimately locates its Mid-Atlantic Hub at the Airport, the property at issue and the surrounding properties already owned by the Airport Authority are needed for the expansion and enlargement of the facilities of the Airport, including but not limited to the cargo storage and handling facilities, and to permit better utilization of the Airport Authority's existing properties for aviation purposes. The property at issue and the surrounding properties already owned by the Airport Authority can be used for air cargo facilities, for new maintenance facilities, and for other aeronautical uses at the Airport, and can be used to relocate existing facilities at the Airport.

21. Acquisition of the property at issue will fill in the Airport Authority's land holdings in the northwest quadrant of the Airport. The property at issue in this action and the property at issue in Guilford County Superior Court Case No. 98 CvS 11587 are the only two properties on Old Oak Ridge Road between Inman Road and Bryan Boulevard which are not owned by the Airport. Upon acquisition of these properties, the Airport Authority will have substantial flexibility with regard to the use of the Airport's property in the area. Obtaining the property at issue and the property at issue in Case No. 98 CvS 11587 will provide the Airport Authority with substantial united acreage for development of the Airport. Ownership of all of the

land in this sector of the Airport will also give the Airport Authority the ability to respond to potential tenants who can benefit the Airport and the region served by the Airport.

22. Without the acquisition of the property at issue in this action, the Airport Authority's ability to develop the surrounding property, which is already owned by the Airport Authority, will be severely limited. The Airport Authority believes that the development of this area for Airport purposes by the Airport Authority will be for the benefit of the Airport and for the benefit of the people of the surrounding counties served by the Airport.

23. Defendant Kent W. Urbine has offered evidence attempting to show that governmental entities not parties to this lawsuit have proposed various economic "incentives" to Federal Express provided it locates its Mid-Atlantic Hub at the Airport.

CONCLUSIONS OF LAW

1. The foregoing finding of fact are denominated as conclusions of law to the extent that they constitute the same.

2. The Airport Authority is a body politic and corporate created by the General Assembly of North Carolina.

3. The Airport Authority has the right of eminent domain.

4. The Airport Authority has the right to acquire title to real property in fee simple by condemnation under Chapter 40A of the North Carolina General Statutes.

5. The Airport Authority is condemning the property at issue for a proper public purpose and use of enabling the Airport Authority to maintain, improve, operate and develop the facilities of the Airport, of enabling the Airport Authority to have the property available for expansion and enlargement of the Airport's facilities, including but not limited to the Airport's cargo handling facilities, and of enabling the Airport Authority to better utilize its existing properties for Airport purposes.

6. It is necessary and in the public interest for the Airport Authority to acquire by condemnation the fee simple title to the land described in the Complaint, as amended.

7. The taking at issue is for a proper public purpose and use whether or not Federal Express constructs its Mid-Atlantic Hub at the Airport.

8. The taking at issue does not violate Article V, Section 2 (1), or Article I, Section 19, of the North Carolina Constitution, nor does it violate Article I,

Section 8, cl. 3, of the United States Constitution, or the Fifth Amendment to the United States Constitution.

9. The plats attached to the Airport Authority's Complaint, as amended, as Exhibit B and Exhibit B-1 accurately depict the property at issue.

10. The Complaint identifies all persons, firms, and corporations identified by the Airport Authority who may have or claim to have an interest in the property at issue.

11. The Complaint, as amended, identifies all liens and encumbrances ascertained by reasonable diligence by the Airport Authority affecting the property at issue at the time of the filing of the Complaint.

12. The alleged economic incentives proposed to Federal Express by governmental entities not parties to this lawsuit are immaterial to and provide no defense to the Airport Authority's right to condemn the property at issue.

13. Defendant Kent W. Urbine's Counterclaim fails to state a claim upon which relief may be granted, and should be dismissed pursuant to Rule 12(b)(6), North Carolina Rules of Civil Procedure. Any recovery by defendant Kent W. Urbine of expenses and attorneys' fees is governed by N.C.G.S. § 40A-8.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiff Piedmont Triad Airport Authority has the authority to take the property described in the Complaint and the Amendment to Complaint.

2. The property at issue is being taken by the Airport Authority for a public purpose and use.

3. Plaintiff's Motion to Determine Issues Other Than the Issue of Compensation is allowed, and all issues raised by the pleadings in this action, other than the issue of just compensation, are hereby determined in favor of plaintiff in accordance with the Motion and the allegations of the Complaint.

4. Plaintiff is hereby vested with fee simple title to the property described in Paragraph VII of the Complaint, as amended.

5. Plaintiff is hereby granted the right to immediate possession of said property.

6. Defendant Kent W. Urbine's Counterclaim is dismissed with prejudice.

This 20th day of April, 2000.

s/Judson D. DeRamus, Jr.
Superior Court Judge Presiding

APPENDIX C

Excerpt from
Proposal By Piedmont Triad Airport Authority
to Federal Express
(Bates No. AU002151)

****

THE PIEDMONT TRIAD INTERNATIONAL AIRPORT (GSO)

INCENTIVES

FedEx Incentives

Relief of Ad Valorem Taxes	$ 34.9 million
Elimination of Aircraft Parts Sales Tax	$ 24.0 million
Sales Tax Rebates through Authority Ownership	$ 12.9 million
North Carolina Investment Tax Credits	$ 12.2 million
Employee Training Assistance	$ 10.0 million
Reduced Site Cost	$ 8.1 million
Elimination of Jet Fuel Sales Tax	$ 5.1 million

Workers Comp & Unemployment Insurance Savings	$ 3.7 million
Corporate Income Tax Rate Reduction	$ 2.1 million
Reduction of Sales Tax on Other Purchases	$ 1.2 million
Economic Development Electric Rate Credit	$ 582,499
Elimination of Jet Fuel Inspections Tax	$ 300,000
North Carolina Job Training Tax Credit	$ 112,500
North Carolina Job Tax Credit	$ 110,000
Waiver of Capacity Use Fees	$ 6,100
Tax-Exempt Bond Financing Interest Savings	TBD
Low-Bid Process Exemption for Facility & Equipment	TBD
Expedited Development Process	TBD
Public Transportation to Facility for FedEx Employees	TBD

TOTAL	**$115.3 million**
TOTAL OF INVESTMENTS AND INCENTIVES:	**$156+ million**

APPENDIX D

Excerpt of Testimony of Airport Director
February 21, 2000

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Q. Do you rent any land to them?

A. Only - only -- only the land that would be associated with the ramp.

Q. And how much per square foot?

A. Same rate, 20 cents a square foot.

Q. Tradewinds?

A. Yes. We are leasing some paved area to Tradewinds, and - but I'm not sure. It's less than 20 cents a square foot.

Q. Close to 20 cents?

21 A. No.

22 Q. What's your best estimate of

23 what it is?

24 A. Ten cents, twelve cents.

25 Q. UPS?

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1 A. UPS is using the old terminal

2 ramp for their operation, and I'd say

3 they are – I'd g[illegible]s theirs would be in

4 the same neighborhood, ten to twelve cents.

APPENDIX E

Excerpt from
Proposal By Piedmont Triad Airport Authority
to Federal Express

(Bates No. AU002201-2210)

****

THE PIEDMONT TRIAD INTERNATIONAL AIRPORT (GSO)

EXHIBIT K - FINANCIAL FACTORS

.....

FEDEX Issue	The GSO Solution
Incentives	An aggressive incentive package has been assembled for the FedEx Mid-Atlantic Hub. Participants in this incentive package include the State of North Carolina, Piedmont Triad Airport Authority, Guilford County, City of Greensboro, Duke Power Company and Colonial Pipeline Company. Specific descriptions of these incentives are included in this exhibit. The proposed incentive package is valued over $156 million.

(Bates No. AU002206)

Sales and Use Tax
Sales and Use Tax Rate - 6%
Sales tax on aircraft is limited to $1,500 per aircraft

Sales taxes paid by the Piedmont Triad Airport Authority for Construction Materials, Sorting Equipment, Furniture & Computer Equipment and Ground Support Equipment to be owned by GSO would be refunded to PTAA by the State. These moneys would be used to reduce the project costs; with these reductions in costs to be passed through to FedEx under the Special Purpose Facility financing lease.

The State will pursue legislation to eliminate sales taxes on purchase of aircraft parts, lubricants and accessories. FedEx would be liable for sales taxes on the annual purchases. The State expects that the NC Department of Revenue will grant a certificate of authority, specifying that only a percentage of those purchases are apportioned to North Carolina. Assuming an apportionment rate of 90%, FedEx would only pay sales tax on 90% of its "other annual purchases."

Sales Tax on Other Annual Purchases

Other Annual Purchases	$10,700,000
Sales Tax Rate	6%
Annual Estimate	$ 642,000

Local Taxes
Local Property Taxes

The current property tax rate at the FedEx site is $0.6997 per $100 of appraised value. Property taxes would be due on all real and tangible personal property owned by FedEx. PTAA, as an authority, does not pay local property taxes, so real and personal property owned by PTAA would not be subject to local property tax. This could include Furniture, Fixtures and Computers, Ground Sort Equipment and other personal property as determined by FedEx.

Assuming that PTAA owns: Sort Facility, Sort Equipment, and Ground Support Equipment and that FedEx owns: Furniture and Computer Equipment and Leased and Owned Aircraft:

Furniture and Computer Equipment	$12,750,000
Leased Aircraft	$23,537,770
Owned Aircraft	$27,827,959
Total Personal Property	$64,115,729
Rate	$ 0.6997/$100
Annual Local Property Tax Estimate	$ 641,157

(Bates No. AU002209)

Elimination of Sales Tax on Aircraft Parts, Lubricants & Accessories

Presently, the North Carolina Department of Revenue expects to issue a certificate of authority apportioning 20% of annual purchases of aircraft parts, lubricants & accessories to North Carolina. This apportionment will result in savings of $19,200,000 over 20 years (assuming $20,000,000 in total annual purchases). Additionally, the State will pursue legislation in the North Carolina General Assembly to eliminate the sales tax on aircraft parts, lubricants & accessories for air cargo carriers based on NC air miles vs. total system miles.

*** Value: $24,000,000**

Elimination of the Jet Fuel Sales Tax

Presently, the North Carolina Department of Revenue expects to issue a certificate of authority apportioning 10% of Jet Fuel Sales Taxes to North Carolina based on NC air miles vs. total system miles. This apportionment will result in savings of $4,665,600 over 20 years (assuming 6,000,000 gallons of fuel at $0.72 per gal). Additionally, the State will pursue legislation in the North Carolina General Assembly to eliminate the jet fuel tax for air cargo hubs.

*** Value: $5,184,000**

(Bates No. AU002210)

Relief of Ad Valorem Taxes

Locating the FedEx Mid-Atlantic Hub at the Piedmont Triad International Airport will eliminate any ad valorem taxes owed on real estate and personal property owned by PTAA.

Value: $34,941,704

Reduction in Sales Tax on "Other Annual Purchases"

The State Revenue Department is expected to issue a certificate of authority apportioning 90% of these purchases to NC based on NC air miles vs. total system miles. The figure below is based on $10,700,000 in annual purchases and a sales tax rate of 6%.

Value: $1,284,000

Sales Tax Reduction through Authority Ownership

PTAA will receive a rebate of sales tax on construction materials, sorting equipment, and ground support equipment owned by PTAA. This rebate will be passed on to FedEx through lower lease or bond payments. This figure is based on $216,000,000 in construction materials, sorting equipment, and ground support equipment.

Value: $12,997,500

APPENDIX F
(Bates Nos. AU002407)

Excerpt From North Carolina Proposal for
Federal Express Mid-Atlantic Hub

****

Current and Proposed North Carolina Package - Synopsis

(all bracketed numbers reflect approximate 20 year totals: ✈ = legislation required)

Current ($77-109 million):

- Relief from ad valorem taxes as a result of authority ownership ($32-63 mill)
- Refund (to eligible authority) of construction materials and equipment sales tax ($12 mill)
- Certificate of authority for reduction of sales tax liability for jet fuel and all annual purchases ($25 mill)
- Corporate income tax rate reduction ($2 mill)
- Tax credits for jobs, investment, and training ($2-3 mill)
- Maintain workers compensation & unemployment insurance savings (as compared with SC) ($4 mill)

- Interest savings on government tax-exempt bond financing

Proposed Additional Savings ($26 million):

- ✈ Provide exemption for "low bid" process for facility construction and equipment purchase

- ✈ Eliminate [sic] sales tax on annual purchases of aircraft parts, lubricants and accessories ($4.8 mill)

- ✈ Eliminate of jet fuel inspection tax ($300,000)

- ✈ Eliminate - or apportion jet fuel sales tax ($500,000) . . .

APPENDIX G

Excerpt of Testimony of Airport Director
February 21, 2000

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19 Q. Would you show us where
20 Mr. Urbine's property is with reference to
21 the FedEx building?
22 A. It's probably right in – right
23 in there (indicating) – pretty close to
24 inside that building there.

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19 Q. Do you recall assuring FedEx
20 that the Airport Authority would undertake
21 to condemn land when necessary to make
22 room for its building?
23 A. To make room for the site, yes.
24 Q. And of course, that is what the

25 Airport Authority did in Mr. Urbine's....

Excerpt from PTAA letter to FedEx
Dated April 8, 1998
(Bates No. AU002107-2112)

****

Mr. Tony DiGirolamo, Manager
Airport Relations and Development
Federal Express Corporation
2nd Floor
2003 Corporate Avenue
Memphis, Tennessee 38132

Re: Proposal of Piedmont Triad Airport Authority for Mid-Atlantic Hub

Dear Mr. DiGirolamo:

* * *

1. Acquisition of land for the Hub Site: The Authority's efforts to acquire the land for the Hub site (both the initial premises and the option area) are well underway. Surveys have been completed with respect to all the tracts, and as appraisals are completed, offers are being made to the landowners. The Authority will condemn any tracts which it cannot purchase through negotiation.

* * *

We would be delighted to furnish you with any additional information you may need, and we look forward to what we hope will be your selection of GSO as the site for your facility.

With kindest regards,

Sincerely,

/s/ F. Hudnall Christopher, Jr.
Chairman

APPENDIX H

Excerpt of Testimony of Airport Director
February 21, 2000

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Q. Do you know whether or not they made – or asked other airports to make a proposal to them for a hub?

A. I understand there was six airports that were asked – who sent a request for proposal.

APPENDIX I

Excerpt of Testimony of Airport Director
February 21, 2000

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Q. (Mr. Maready) Do you have any idea who proposed, specifically, to the legislature that that allocation be 90 percent?

A. No, sir. I have no idea.

Q. Obviously, 90 percent of the aircraft would not be used in North Carolina, would they?

A. I think that'd be a fair assumption, right.

* * *

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* * *

Q. Do you know, sir, any basis for apportioning 20 percent of aircraft parts, lubricants, and accessories to North Carolina as opposed to other states?

A. No, sir.

APPENDIX J

IN THE GENERAL COURT OF JUSTICE
OF NORTH CAROLINA

SUPERIOR COURT DIVISION
GUILFORD COUNTY
Case No. 99 11586

PIEDMONT TRIAD AIRPORT AUTHORITY,

Plaintiff

v.

KENT W. URBINE, et al.

Defendant.

AMENDED ANSWER OF
DEFENDANT, KENT W. URBINE
TO PLAINTIFF'S AMENDMENT
TO COMPLAINT

COMES NOW defendant Kent W. Urbine and amends his Answer to Plaintiff's Amendment to Complaint, Declaration of Taking and Notice of Deposit, which this defendant filed on January 4, 2000,

in accordance with Rule 15(a) of the North Carolina Rules of Civil Procedure, as follows:

1. Paragraph VII, as amended, is denied.

2. This defendant does not have sufficient knowledge or information sufficient to form a belief as to the allegations in Paragraph VIII, as amended, and therefore, he denies same.

3. This defendant does not have sufficient knowledge or information sufficient to form a belief as to the allegations contained in Paragraph IX, as amended, and therefore, he denies same.

4. This defendant admits that there is a right-of-way for Old Oak Ridge Road. This defendant does not have sufficient knowledge or information to form a belief as to the remaining allegations in Paragraph XII, as amended, and therefore, except as expressly admitted, he denies same.

5. This defendant does not have sufficient knowledge or information to form a belief as to the allegations contained in the added exhibits, and therefore, he denies same.

DEFENSES

FOR A FURTHER ANSWER AND DEFENSE to the Complaint, Declaration of Taking and Notice of Deposit of the Plaintiff and Amendment to Complaint,

Declaration of Taking and Notice of Deposition of the Plaintiff, defendant Kent W. Urbine alleges and says:

1. Plaintiff's intended use of the property that is the subject of this action is for the sole effective use of a private, for-profit corporation.

2. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of the Constitution of the State of North Carolina, Article V, Section 2(1) because the taking represents the expenditure of public tax funds for other than a public purpose, specifically, the sole effective use of a private, for-profit corporation.

3. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of the Fifth Amendment to the United States Constitution, which allows the taking of private property for public use only, because the taking represents the expenditure of public tax funds for other than a public purpose, specifically, the sole effective use of a private, for-profit corporation.

4. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of Article I, Section 8, cl. 2 of the United States Constitution, the Commerce Clause. In the taking and proposed use of this property, the plaintiff, a public agency operating pursuant to the authority of the State of North Carolina, has placed an impermissible burden on interstate commerce through unconstitutional discrimination

between in-state commercial activities and interstate commercial activities.

5. Furthermore, plaintiff's proposed use of the property, a runway and other facilities for the sole effective use of a for-profit corporation, will be a private airport. Therefore, this taking is also in violation of Title 14 of the Code of Federal Regulations, parts 151 and 152, which allows federal funds to be used for projects at public airports only.

6. Plaintiff's Complaint, Declaration of Taking and Notice of deposit are in violation of the Constitution of the State of North Carolina, Article I, Section 19, which allows taking of private property only in accordance with law. Plaintiff's actions are not in accordance with law in that they are in violation of the Constitution of the State of North Carolina, Article V, Section 2(1); the United States Constitution, Article I, Section 8, cl. 2; the Fifth Amendment to the United States Constitution; and Title 14 of the Code of Federal Regulations, parts 151 and 152.

COUNTERCLAIM

Defendant, Kent W. Urbine, complaining of Plaintiff, alleges and says:

1. Defendant Kent W. Urbine resides at 6025 Old Oak Ridge Road, Greensboro, North Carolina 27410.

2. According to information and belief, Plaintiff is a corporation created pursuant to the provisions of Chapter 98 of the Public-Local Laws of North Carolina, Session 1941, and amendments thereto, and pursuant to Chapter 1078 of the 1979 Session Laws of North Carolina (2nd Session 1980) and amendments thereto.

3. On December 14, 1998, Plaintiff filed a Complaint, Declaration of Taking, and Notice of Deposit, declaring that it had acquired by right of eminent domain property owned by Kent W. Urbine, as described in Exhibit A to the Complaint.

4. Plaintiff's intended use of the property that is the subject of this action is for the sole effective use of a private, for-profit corporation.

5. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of the Constitution of the State of North Carolina, Article V, Section 2(1) because the taking represents the expenditure of public tax funds for other than a public purpose, specifically, the sole effective use of a private, for-profit corporation.

6. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of the Fifth Amendment to the United States Constitution, which allows the taking of private property for public use only, because the taking represents the expenditure of public tax funds for other than a public purpose,

specifically, the sole effective use of a private, for-profit corporation.

7. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of Article I, Section 8, cl. 2[3] of the United States Constitution, the Commerce Clause. In the taking and proposed use of this property, the plaintiff, a public agency operating pursuant to the authority of the State of North Carolina, has placed an impermissible burden on interstate commerce through unconstitutional discrimination between in-state commercial activities and interstate commercial activities.

8. Furthermore, plaintiff's proposed use of the property, a runway and other facilities for the sole effective use of a for-profit corporation, will be a private airport. Therefore, this taking is also in violation of Title 14 of the Code of Federal Regulations, parts 151 and 152, which allows federal funds to be used for projects at public airports only.

9. Plaintiff's Complaint, Declaration of Taking and Notice of Deposit are in violation of the Constitution of the State of North Carolina, Article I, Section 19, which allows taking of private property only in accordance with law. Plaintiff's actions are not in accordance with law in that they are in violation of the Constitution of the State of North Carolina, Article V, Section 2(1); the United States Constitution, Article I, Section 8, cl. [3]; the Fifth Amendment to the United

States Constitution; and Title 14 of the Code of Federal Regulations, parts 151 and 152.

WHEREFORE, defendant Kent W. Urbine prays the court as follows:

1. For a determination that Plaintiff's taking of the property of this defendant is in violation of law

2. For transfer of title to the property taken by Plaintiff to Kent W. Urbine

3. For punitive damages in such amount as may be established by a jury

4. For attorneys' fees pursuant to G.S. 40A-8(b).

5. For the costs of this action, including fees and expenses paid to expert witnesses, pursuant to G.S. 40A-8(a)

6. For such other and further relief as the court deems just and proper.

Demand is hereby made that all issues be tried by a jury.

This 14th day of January, 2000.

/s/ William F. Maready
State Bar No. 2866

/s/ Celie B. Richardson
State Bar No. 25506

No. 01-1096

Supreme Court, U.S.
FILED
FEB 27 2002
CLERK

In The

Supreme Court of the United States

KENT W. URBINE,

Petitioner,

v.

PIEDMONT TRIAD AIRPORT AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
NORTH CAROLINA

BRIEF IN OPPOSITION

FEB 27 2002
POLICE DEPARTMENT
SUPREME COURT U.S.
RECEIVED

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STATEMENT OF THE CASE

The Petition describes a case different from the one decided by the trial court and the North Carolina Supreme Court. This is a routine condemnation case, in which respondent Piedmont Triad Airport Authority ("PTAA") seeks to acquire 2.326 acres of land owned by Petitioner ("the Property"). The Property is surrounded by land already owned by PTAA. Both the trial court and the North Carolina Supreme Court held that PTAA is authorized to condemn the Property. Both the trial court and the North Carolina Supreme Court rejected Petitioner's federal Constitutional challenges, including Petitioner's Commerce Clause challenge to the condemnation.

The question now presented by Petitioner is not the question that was, or could have been, decided by the North Carolina courts. As those courts properly concluded, this is a condemnation case, and nothing more. Those courts concluded that the Commerce Clause issue raised by Petitioner based upon an alleged "package" of incentives offered to Federal Express Corporation ("Federal Express") by the State of North Carolina and local government entities was not properly before them because the incentives were immaterial to PTAA's right to condemn the Property and because neither the State nor the local government entities were parties to the case.

The trial court found as a fact:

> Defendant Kent W. Urbine has offered evidence attempting to show that governmental entities not parties to this lawsuit have proposed various economic "incentives" to Federal Express provided it locates its Mid-Atlantic Hub at the Airport.

Pet. App. 24a. Upon this finding, the trial court concluded as a matter of law:

> The alleged economic incentives proposed to Federal Express by governmental entities not parties to this lawsuit are immaterial to and provide no defense to the Airport Authority's right to condemn the property at issue.

Pet. App. 26a.

The North Carolina Supreme Court also concluded that a Commerce Clause challenge to the alleged incentive "package" was not properly before it, stating:

> Defendant next challenges this condemnation proceeding by alleging that PTAA offered Federal Express numerous unconstitutional incentives to build its air cargo hub at the airport. Defendant classifies the condemnation as one of the incentives. Specifically, defendant contends that the proposed incentives violate Article I, Section 8, Clause 3 (the Commerce Clause) of the United States Constitution; ...

> The only portion of this issue properly before this Court is the condemnation of defendant's property. Defendant's challenge to the "package" of economic incentives, apart from the use of eminent domain, pertains to offers by entities not parties to this action and is outside the scope of our review. Thus, the only remaining question presented in this issue is whether the Commerce Clause is a sustainable defense to the condemnation proceeding. . . . We find no case law that supports the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property. This assignment of error is overruled.

Pet. App. 12a-13a.

This case, then, is not about economic incentives. That issue was not properly raised in the state courts below and is not properly before this Court. This case is and always has been a routine condemnation action, which the state courts concluded has been properly conducted by PTAA in accordance with all applicable state law and which is not precluded by the Commerce Clause.

PTAA condemned the Property, which is surrounded by other property owned by PTAA, because, as the trial court found:

> 20. Whether or not Federal Express ultimately locates its Mid-Atlantic Hub at the Airport, the property at issue and the surrounding properties already owned by the Airport Authority are needed for the expansion and enlargement of the facilities of the Airport, including but not limited to the cargo storage and handling facilities, and to permit better utilization of the Airport Authority's existing properties for aviation purposes. . . .
>
> 21. Acquisition of the property at issue will fill in the Airport Authority's land holdings in the northwest quadrant of the Airport. The property at issue in this action and the property at issue in Guilford County Superior Court Case No. 98 CvS 11587 are the only two properties on Old Oak Ridge Road between Inman Road and Bryan Boulevard which are not owned by the Airport. . . .

Pet. App. 23a.

Since the Property was properly condemned for a public purpose, i.e. airport development, "whether or not Federal Express ultimately locates its Mid-Atlantic Hub at the Airport", Pet. App. 23a, the trial court concluded that the incentives issue, which related only to Federal Express, was immaterial.

Likewise, the North Carolina Supreme Court concluded:

> We are aware that the timing of the events surrounding this condemnation proceeding point to an inference that the property is being acquired to prepare for the accommodation of an expanded Federal Express facility. Our review of the facts leads us to the conclusion, consistent with that of the trial court, that the condemnation proceeding arises from PTAA's long-range plan to develop air-cargo facilities as called for in the [Airport Authority's] master plan. While the overtures from Federal Express may have hastened the timing of this development, they are not the genesis of PTAA's actions.

Pet. App. 11a.

The incentives issue was not properly before the state courts procedurally, and it was immaterial to the validity of the condemnation, as both courts below recognized. The same would be true in this Court.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PROPERLY PRESENT THE QUESTION UPON WHICH PETITIONER SEEKS REVIEW.

Whether the incentives complained of by Petitioner violate the Commerce Clause was not decided by the state courts below because Petitioner was procedurally barred from raising this issue. The parties necessary for a determination of the issue, i.e. the parties offering the incentives and the parties allegedly discriminated against by the incentives, are not parties to the case. The same procedural defect persists in this Court, presenting an insurmountable obstacle to the Court's consideration of the issue.

The courts below also determined that the incentives were immaterial to the condemnation. Whatever incentives were offered to Federal Express, they have no logical bearing on the sole issue in the case, which is whether PTAA has the right to condemn the Property. The tax incentives described in the Petition were offered by the North Carolina General Assembly, not PTAA. Furthermore, the trial court found, and the North Carolina Supreme Court agreed, that Federal Express was not the genesis for the condemnation. PTAA has need for and has properly condemned the Property, whether or not Federal Express locates its Mid-Atlantic Hub facility at the Airport. Therefore, even if the incentives offered to Federal Express somehow violate the Commerce Clause, this violation cannot affect the condemnation itself. The immateriality of the Commerce Clause-incentives issue to the condemnation at issue precludes this Court's consideration of the issue in this setting.

II. PETITIONER LACKS STANDING TO RAISE A COMMERCE CLAUSE CHALLENGE.

By raising a Commerce Clause issue, Petitioner is trying to assert the rights of others. Petitioner lacks standing to pursue this challenge. A party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975). Petitioner contends that the alleged incentives offered to Federal Express by the State of North Carolina and local government units discriminate against interstate commerce, apparently on the theory that a company that chooses to build a facility outside of North Carolina cannot benefit from the incentives and is being discriminated against. Even if this argument could be considered in this case, the party with standing would be the out-of-state company, not Petitioner. See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1381 (8th Cir. 1997), cert. denied, 522 U.S. 1036 (1997).

III. EVEN IF THE TAKING IS SUBJECT TO COMMERCE CLAUSE ANALYSIS, PETITIONER HAS NOT SHOWN ANY VIOLATION OF THE COMMERCE CLAUSE.

"The paradigmatic example of a law discriminating against interstate commerce is the protective tariff or customs duty, which taxes goods imported from other States, but does not tax similar products produced in State." West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994). The condemnation

here involves no such tariff or comparable burden on any out-of-state interest. Therefore, it does not implicate the Commerce Clause.

Petitioner relies primarily upon Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), and West Lynn Creamery, Inc. v Healy, 512 U.S. 186 (1994). These cases are completely inapposite. In both cases, the State imposed a tax burden on out-of-state business that was not imposed on local business, resulting in unconstitutional discrimination.

In Boston Stock Exchange, the New York legislature amended a tax statute addressing the sales of securities "so that transactions involving an out-of-state sale [would be] taxed more heavily than most transactions involving a sale within the state." Id. at 319. As a result of the statutory amendment, "a nonresident contemplating the sale of securities that would be delivered or transferred in New York" faced a significantly higher tax burden if the sale was made outside New York. Id. at 331. The Court held that "[b]ecause it imposes greater tax liability on out-of-state sales that on in-state sales," the tax violated the Commerce Clause. Id. at 332. The Court concluded its opinion: "We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State." Id. at 337.

Likewise in West Lynn Creamery, Massachusetts imposed a discriminatory burden on out-of-state milk producers as compared with in-state producers. West Lynn Creamery, 512 U.S. at 190-91. All milk sold in Massachusetts was taxed by the state, but the funds collected were then distributed to in-state milk producers. Id. The combination of the tax and

subsidy had the effect of a tariff upon out-of-state producers that violated the Commerce Clause. Id. at 199.

Neither PTAA nor any other governmental entity has imposed any tax or other burden on an out-of-state entity. PTAA does not even have the power to tax. Pet. App. at 16a.

Moreover, Petitioner has failed to show how any of the property taxes or sales taxes referred to in the Petition would apply to operations that are performed from out-of-state facilities by competitors of Federal Express, much less how a discriminatory burden has been imposed on such operations. These property taxes and sales taxes on in-state property and in-state purchases do not violate the Commerce Clause.[1]

---

[1] Petitioner's Commerce Clause challenge fails for two other reasons. First, PTAA's lease proposal to Federal Express is within its proprietary powers; PTAA is, therefore, protected by the "market participant exception" to the application of the Commerce Clause. See Four T's, Inc. v. Little Rock Municipal Airport Commission, 108 F.3d 909, 912-13 (8th Cir. 1997); Air Transport Association of America v. City and County of San Francisco, 992 F. Supp. 1149, 1163 (N.D.Cal. 1998), affirmed, 266 F.3d 1064 (9th Cir. 2001). Second, when Congress specifically authorizes the actions of a local government entity, those actions cannot violate the Commerce Clause. See Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 652-53 (1981); 49 U.S.C. §41713 (authorizing airports to carry out their "proprietary powers and rights"); 49 U.S.C. §47101(a)(4) & (7)(supporting the nationwide development of "cargo hub airports" and projects to accommodate passenger and cargo traffic).

IV. THIS CASE MEETS NONE OF THE STANDARDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI SET FORTH IN THE RULES OF THIS COURT.

Rule 10 of the United States Supreme Court sets forth the considerations governing review on certiorari. Pursuant to Rule 10, a petition for writ of certiorari will be granted "only for compelling reasons." There are no compelling reasons to review this case.

Furthermore, none of the specific grounds set forth in Rule 10 are satisfied by the Petition. The North Carolina Supreme Court has not decided an important question of federal law. The North Carolina Supreme Court determined that the condemnation at issue was for a public use consistent with the North Carolina General Statutes, North Carolina case law and the North Carolina Constitution.

With respect to Petitioner's Commerce Clause challenge, the North Carolina Supreme Court stated that the only issue properly before it was the condemnation of defendant's property; it concluded that there is no case law supporting the proposition that the Commerce Clause is a sustainable defense to the condemnation of real property. Since condemnation of real property has occurred in the United States for centuries, the North Carolina Supreme Court's decision that the Commerce Clause does not apply to the taking of real property does not involve an important question of federal law.

The North Carolina Supreme Court's decision regarding the inapplicability of the Commerce Clause to the condemnation also does not conflict with a decision of another state court of last resort, a United States court of appeals or this Court. There are no

conflicting decisions, as shown by Petitioner's failure to cite any case in which the Commerce Clause has been applied to prevent the condemnation of real property.

Finally, there is no reason why the Commerce Clause's applicability to the condemnation of real property should be "settled" by this Court. The Federal Constitutional basis for challenging a condemnation of real property is the Fifth Amendment of the United States Constitution, not the Commerce Clause.

CONCLUSION

The Petition is based upon an alleged violation of the Commerce Clause. The Commerce Clause has never been applied to prevent a condemnation of real property. The cases of this Court interpreting the Commerce Clause have focused upon alleged discrimination in taxation by a state in favor of an in-state competitor to the harm of an out-of-state competitor. Here, neither the parties alleged to have established the allegedly discriminatory taxing scheme (the State of North Carolina and local government units) nor the parties alleged to have been discriminated against (the competitors of Federal Express) are parties in this case. The case has been decided correctly by the trial court and the North Carolina Supreme Court based on the real issue in the case, namely whether PTAA has the authority to condemn the Property. If there is any issue to be raised concerning the constitutionality of alleged incentives to be provided by the State of North Carolina and local government units to Federal Express, that issue is for another case, litigated by the real parties in interest.

Respectfully submitted, this 26th day of February, 2002.

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